

STATE OF MICHIGAN  
IN THE SUPREME COURT  
(On Appeal from the Circuit Court of the County of Wayne)

---

ROGER MANN,

Plaintiff-Appellee,

vs.

SHUSTERIC ENTERPRISES, INC.,  
d/b/a SPEEDBOAT BAR & GRILL,  
a Michigan corporation,

Defendant/Appellant,

-and-

BADGER MUTUAL INSURANCE COMPANY,  
a Wisconsin Insurance Company,

Defendant, Not Participating.

Supreme Court Docket  
No. 120651

Court of Appeals Docket  
No. 210920

Wayne County Circuit Court  
No. 96-618088-NO

Honorable Sharon Tevis Finch

---

**AMICUS CURIAE BRIEF OF QUICK-SAV FOOD STORES, LTD.**  
**and QUICK-TRACKER MANAGEMENT, INC.**

---

CHEATHAM, ESTES & HOLLMAN, P.C.  
BY: LEE C. ESTES (P29181)  
Attorney at Trial for  
Defendant-Appellant SPEEDBOAT  
5777 W. Maple Road, Suite 130  
West Bloomfield, MI 48325-5002  
(248) 932-2000

JOHN P. JACOBS, P.C.  
BY: JOHN P. JACOBS (P15400)  
Attorney "Of Counsel" for  
Defendant-Appellant SPEEDBOAT  
Suite 600, The Dime Building  
719 Griswold  
P.O. Box 33600  
Detroit, MI 48232-5600  
(313) 965-1900

JAMES D. BRITTAIN, P.C.  
BY: JAMES D. BRITTAIN (P28602)  
Attorney for Plaintiff-Appellee  
ROGER MANN  
20619 Ecorse Road  
Taylor, MI 48180  
(734) 383-5500

BY: MARTIN N. FEALK (P29248)  
Co-Counsel for Plaintiff-Appellee  
ROGER MANN  
20619 Ecorse Road  
Taylor, MI 48180  
(313) 381-9000

## TABLE OF CONTENTS

	<u>PAGE(S)</u>
INDEX OF AUTHORITIES.....	ii
STATEMENT OF QUESTION PRESENTED .....	1
CONCISE STATEMENT OF FACTS AND PROCEEDINGS .....	2
ARGUMENT .....	7
I.     Should the Supreme Court issue an unequivocal ruling declaring that no “Common Law” cause of action may be maintained against a Michigan liquor license holder other than the cause of action allowed by the Michigan Dram Shop Act (MCL 436.1801) when evidence of alcohol consumption which is furnished by the liquor license holder is a contributing factor to the incident causing damage or injury.	
CONCLUSION.....	12
RELIEF SOUGHT .....	13

## INDEX OF AUTHORITIES

### STATE CASES

<i>Barrett v Campbell</i> , 131 Mich App 552 (1983).....	8
<i>Jackson v PKM Corporation</i> , 430 Mich 262 (1988).....	9, 10
<i>Kangas v Suchorski</i> , 372 Mich 396 (1964).....	8
<i>Kerry v Turnage</i> , 154 Mich App 275 (1986).....	8
<i>Lucido v Apollo Lane</i> , 123 Mich App 267 (1983).....	8
<i>Manuel v Weitzman</i> , 386 Mich 157 (1971).....	2, 7, 12, 13
<i>Millross v Plum Hollow Golf Club</i> , 429 Mich 178 (1987).....	8
<i>Morris v Markley</i> , 143 Mich App 12 (1985).....	9, 10
<i>Rowan v Southland Corporation</i> , 90 Mich App 61 (1979).....	8, 9

### STATE STATUTES

MCL 436.22(1) .....	2
MCL 436.1801 .....	3
MCL 436.1801(10) .....	2

**STATEMENT OF QUESTION PRESENTED**

I.

Should the Supreme Court issue an unequivocal ruling declaring that no "Common Law" cause of action may be maintained against a Michigan liquor license holder other than the cause of action allowed by the Michigan Dram Shop Act (MCL 436.1801) when evidence of alcohol consumption which is furnished by the liquor license holder is a contributing factor to the incident causing damage or injury.

Defendant-Appellant QUICK-SAV and QUICK-TRACKER MANAGEMENT (QUICK SAV) state the answer should be 'YES'.

## CONCISE STATEMENT OF FACTS AND PROCEEDINGS

The Michigan Supreme Court, in the case of Mann v Shusteric, Inc., d/b/a Speedboat Bar & Grill, Supreme Court No. 120651, granted leave to appeal pursuant to Order entered December 11, 2002. In said Order, the Supreme Court specifically addressed the viability of Manuel v Weitzman, 386 Mich 157 (1971).

The Supreme Court also issued an Order in the case of Timothy H. Knecht, et al v Quick-Sav Food Stores, Ltd, and Quick-Tracker Management, Inc., (Supreme Court No. 121622), that Defendants' Application for Leave to Appeal the Trial Court's Denial of Defendant's Motion for Summary Disposition be held in abeyance pending a decision by the Supreme Court in the Mann v Shusteric Enterprises, Inc. case for the reason that the decision in Mann may resolve issues raised in the Knecht, et al v Quick-Sav, et al matter.

Both the Knecht case and the Mann case dealt with claims against liquor license holders where furnishing of alcohol by a liquor license holder was alleged. Both cases had complaints which included so-called "Common Law" allegations against the liquor license holder.

Defendants, QUICK-SAV and QUICK-TRACKER MANAGEMENT, contend that the exclusive remedy provision of the Michigan Dram Shop Act, currently known as MCL 436.22(1); MCL 436.1801(10) should bar any **transparent attempt** to allege a common law premises liability claim against a Michigan liquor license holder when the **true underlying basis** for the claim arises out of the **selling, giving or furnishing of alcoholic liquor**.

To allow aberrant, non-fact based pleading on the part of the Plaintiff for the sole purpose of stating a "Common Law" cause of action is contrary to the express intent of the Legislature which drafted the exclusive remedy provision of the Michigan Dram Shop Act.

The Michigan Legislature has enacted the Michigan Dram Shop Act (MCL 436.1801) which provides in part as follows:

- (2) A retail licensee **shall not directly**, individually, or by a clerk, agent or servant sell, furnish or give alcoholic liquor to a minor except as otherwise provided in this act." (Emphasis added)
- (10) This section provides exclusive remedy for money damages against a licensee arising out of the selling, giving, or furnishing of alcoholic liquor."

The clear intent of the Legislature was to preclude any lawsuits against liquor license holders involving furnishing of alcohol unless those lawsuits were brought as a violation of the Dram Shop Act.

Attached as Exhibit A to this Amicus Brief is a copy of the Complaint filed in the Timothy Knecht, et al v Quick-Sav Food Stores, et al. The attached Complaint serves as a perfect illustration as to how twisted and contorted pleadings become if the express intent of the legislature is not followed regarding the exclusive remedy provision of the Michigan Dram Shop Act. In order to further illustrate this point, it is necessary to briefly look at the factual background in the Knecht case.

#### **FACT BACKGROUND – KNECHT v QUICK-SAV**

In Knecht, a two-vehicle accident occurred at the corner of Owen Road and Whitaker Road in Genesee County on September 24, 1998, at approximately 4:15 a.m. At the time of the accident, Defendant, STEPHANIE CROSS, was a 15-year old minor who had been provided alcohol by Defendants, DEAN MIDDLETON and PEDRO ESPINOZA, both of whom were adults who purchased beer from Defendant QUICK-SAV at approximately midnight. At the time of the accident, Defendant CROSS was operating a 1997 Dodge Avenger which was owned by Defendant MIDDLETON.

Sometime before 10:00 p.m. on September 23, 1998, Defendant ESPINOZA purchased "a box" of beer from Defendants' store located in downtown Linden, approximately two miles from the ultimate accident scene. At or about 10:00 p.m., Defendants' clerk, Brandy Dean, began her work shift (Deposition testimony of Brandy Dean, page 12).

Sometime around 11:30 p.m., Mr. ESPINOZA and Mr. MIDDLETON again stopped at Defendants' store (Deposition testimony of Brandy Dean, page 19). Mr. ESPINOZA went to the back of the store to buy "a box" of beer, while Defendant MIDDLETON stayed in the doorway of the store. Defendant ESPINOZA thereafter went to the front of the store, made the purchase and **AFTER THE PURCHASE WAS MADE**, Defendant ESPINOZA was approached by Defendant CROSS, a minor. Defendant CROSS had met MIDDLETON and ESPINOZA earlier in the evening and obtained some alcoholic beverages from them (Deposition testimony of Brandy Dean, page 31). At the time of the purchase from Brandy Dean, she did not know MIDDLETON and ESPINOZA were the individuals who STEPHANIE CROSS and her friends met earlier in the day (Deposition testimony of Brandy Dean, pages 24, 31). Prior to the time of the second purchase, Mr. ESPINOZA had consumed large quantities of beer; however, it is disputed as to whether or not Mr. ESPINOZA was visibly intoxicated at Defendant, QUICK-SAV's store at the time of the 11:30 p.m. sale.

After the purchase, STEPHANIE CROSS decided she was going to leave with ESPINOZA and MIDDLETON and further demanded that she operate the MIDDLETON motor vehicle (Deposition testimony of Brandy Dean, page 29; Deposition testimony of Stephanie Cross, pages 39, 41). Defendant's clerk, Brandy Dean, attempted to stop

Defendant CROSS from leaving with the adults, advising MIDDLETON and ESPINOZA that CROSS was a minor (Deposition testimony of Brandy Dean, page 30). When STEPHANIE CROSS insisted on leaving with the adults in order to consume more beer, Defendant's clerk, Brandy Dean immediately called 911 and reported the incident (Deposition testimony of Brandy Dean, page 30; Deposition testimony of Stephanie Cross, page 44). The emergency call was recorded as being made at 11:56 p.m. on September 23, 1998.

After leaving Defendants' store at approximately midnight, Defendants MIDDLETON, ESPINOZA and the minor, STEPHANIE CROSS, traveled in and about Flint for over three hours. At approximately 3:30-4:00 a.m. Defendants CROSS, MIDDLETON, AND ESPINOZA went to the home of KATHLEEN (KAT) FORTIN who sneaked out of her bedroom to join the joyride with the intoxicated adults and the intoxicated minor driver (Deposition testimony of Stephanie Cross, page 94)

Between 3:30-4:00 a.m., Defendant CROSS drove into the parking lot of Defendant QUICK-SAV. Without leaving the automobile, when Defendant CROSS learned that Brandy Dean had called the police, she immediately left the premises (Deposition testimony of Brandy Dean, page 33; Deposition testimony of Stephanie Cross, page 99). Between 30-45 minutes after leaving Defendants' premises, the traffic accident occurred between the vehicle owned and operated by Defendants MIDDLETON and CROSS and another vehicle operated by a second alleged intoxicated person, Denise Cahill.

#### **THE ALLEGATIONS OF PLAINTIFFS' COMPLAINT**

Plaintiffs' First Amended Complaint was filed to include a Dram Shop claim against Defendant QUICK-SAV after Plaintiff settled dram shop and personal injury claims against



the driver of the automobile which collided with the vehicle in which Plaintiffs' decedent was a passenger.

The Complaint against Defendant QUICK-SAV and others is clearly a claim for damages due to the intoxication of Defendant CROSS while operating the automobile owned by Defendant MIDDLETON (see paragraphs 12-43). The Plaintiff, however, was allowed to plead a separate COUNT VIII entitled:

PREMISES LIABILITY AND/OR NEGLIGENCE AND/OR GROSS  
NEGLECT AND/OR SOCIAL HOST LIABILITY AND/OR NUISANCE  
AGAINST QUICK-SAV AND/OR QUICK-TRACKER

Within COUNT VIII, Plaintiff alleged among other theories, that Defendant QUICK-SAV was responsible for damages from the automobile accident because a minor was in the store after curfew for the minor and Defendant tolerated the violation of curfew!! No allegations of Premises defects, of Nuisance or of Gross Negligence are found in COUNT VIII.

At Motion for Summary Disposition, the Trial Judge refused to grant Motion for Summary Disposition on the so-called "Common Law" theories even though she admitted:

THE COURT : "He has – I mean, again, his theories are extremely unusual, let's face it."

MR. CHASNIS : "And because of that –"

THE COURT : "There [(they) sic] are beyond anything I've ever seen in 21 years, but that's okay."

(Page 11 of transcript of January 28, 2002, Motion for Summary Disposition.)

## ARGUMENT I

Should the Supreme Court issue an unequivocal ruling declaring that no “Common Law” cause of action may be maintained against a Michigan liquor license holder other than the cause of action allowed by the Michigan Dram Shop Act [MCL 436.1801] when evidence of alcohol consumption which is furnished by the liquor license holder is a contributing factor to the incident causing damage or injury.

Since the decision of Manuel v Weitzman, 386 Mich 157 (1971), Plaintiff attorneys have repeatedly attempted to circumvent the exclusive remedy of the Dram Shop Act by intentionally misnaming legal theories as “Common Law” actions. This has occurred despite earlier decisions by this Court attempting to remind the Bench and Bar of the State of Michigan that the Dram Shop Act does not allow “Common Law” causes of action where the furnishing of alcohol by a liquor license holder is a contributing factor in the incident causing injury. Either some members of the Bench and Bar of the State of Michigan are confused, or simply wish to ignore earlier rulings of the Supreme Court in this regard. In order to eliminate the possibility that the lower courts are simply confused as to what the Dram Shop Act provides, Defendants QUICK-SAV propose that **it is time for the Michigan Supreme Court to clearly overrule Manuel v Weitzman, 386 Mich 157 (1971).** The express intent of the legislature stated in the exclusive remedy provision of the Michigan Dram Shop Act which states as follows:

**“This section provides the exclusive remedy for money damages against a licensee arising out of the selling, giving or furnishing of alcoholic liquor.” MCL 436.1801(10)**

When the true, factual basis for the claim arises out of the alleged unlawful selling, giving or furnishing of alcoholic liquor Plaintiffs should not be allowed to continue to circumvent the express intent of the Michigan legislature by alleging a common law liability claim.

The Michigan appellate courts, including the Michigan Supreme Court and the Court of Appeals, have long held that the Michigan Dram Shop Act, MCLA 436.22; MCLA 436.1801, is the exclusive remedy for injuries arising out of the unlawful sale, giving or furnishing of alcoholic liquor pursuant to §(10). Millross v Plum Hollow Golf Club, 429 Mich 178 (1987), Kangas v Suchorski, 372 Mich 396 (1964), Kerry v Turnage, 154 Mich App 275 (1986), Barrett v Campbell, 131 Mich App 552 (1983), Lucido v Apollo Lane, 123 Mich App 267 (1983), and Rowan v Southland Corporation, 90 Mich App 61 (1979).

In each of the above referred to cases, the appellate courts strictly read and applied the exclusive remedy provision of the Michigan Dram Shop Act. In each case the appellate courts focused on the intent of the legislature in promulgating §(10) of the Michigan Dram Shop Act.

In Millross, supra, the Michigan Supreme Court analyzed the legislative history underlining the Michigan Dram Shop Act. The Court noted that the legislature mandated that the Dram Shop Act is the **exclusive remedy** for damages arising out of the selling, giving or furnishing of alcoholic liquor. The Michigan Supreme Court went on to state on page 189:

**“Rather, it is the underlying conduct that must be analyzed.”**

In other words, the Michigan Supreme Court noted that one must analyze the underlying conduct which serves as the subject matter of the lawsuit in order to determine if the Plaintiff’s action against the defendant liquor license holder arises out of the selling, giving or furnishing of alcoholic liquor. If so, the Dram Shop Act is the exclusive remedy.

The Knecht case is a perfect example of how the Michigan Supreme Court should not allow room for Plaintiffs to circumvent the Michigan legislature’s intent behind the exclusive remedy provision §(10) of the Michigan Dram Shop Act by labeling a cause of action as a “Common Law” violation of duty.

The Legislature unequivocally intended that if an illegal sale of alcoholic liquor contributed to an injury, then the Michigan Dram Shop Act is the exclusive remedy for money damages against the licensee.

See Rowan, supra, in which on page 68, the Court of Appeals correctly applied the exclusive remedy provision of the Michigan Dram Shop Act. Plaintiff attempted to plead and prove a common law cause of action for negligence. Plaintiff alleged Defendants were negligent in failing to supervise and train employees to guard against unlawful sales to Minors. The Court of Appeals noted that absent the sale, no cause of action against Defendant would have arisen. Therefore, the exclusive remedy provision of the Dram Shop Act was applicable and barred any such attempt to prove or establish a common law cause of action for negligence.

In Jackson v PKM Corporation, 430 Mich 262 (1988), the Michigan Supreme Court noted that various panels of the Court of Appeals have historically attempted to diminish the effect of the exclusive remedy provision of the Dram Shop Act against a liquor licensee.

In Jackson, the Plaintiff argued that the Defendant license holder was guilty of gross negligence and that, therefore, the exclusive remedy of the Dram Shop Act should not apply. In other words, that the alleged gross negligence exempted the Plaintiff from the restrictions of the exclusive remedy provision of the Dram Shop Act. The Supreme Court of Michigan, in Jackson v PKM Corporation, supra, reversed the Court of Appeals' decision of Morris v Markley, 143 Mich App 12 (1985). In Morris v Markley, an exotic dancer, after being allowed to consume alcohol at her place of employment, was involved in an automobile accident. The Court of Appeals held that although she could not sue her employer for injuries in the automobile accident which occurred because of the intoxication, the Dram Shop Act did not bar the dancer from bringing a gross negligence action against the tavern owner arising out of the automobile accident on the basis of

allegations that the owner had actual notice of the dancer's helpless condition and that, therefore, a common law cause of action was stated.

The Supreme Court of Michigan in Jackson, after reviewing the facts in the case of Morris v Markley, supra, noted that despite an effort to "rename" a theory as a common law breach, the fact of the matter was that the Plaintiff's cause of action arose out of alleged selling, furnishing or providing alcohol, and that the Dram Shop Act and exclusive remedy of same applied.

After a discussion concerning the fact that the Dram Shop Act is a legislatively-created cause of action and is a derogation of common law, the Michigan Supreme Court in Jackson, examined the Plaintiff's Complaint and despite the fact that the pleadings attempted to state a common law cause of action for gross negligence, the Court followed the intent of the statute and noted that the lawsuit dealt with the operation of an automobile after consumption of alcohol. The Court noted that accepting the allegations as true, the Plaintiff's allegations established the cause of action arose out of Defendant's unlawful furnishing of intoxicants to Plaintiff and that the Plaintiff's cause of action was, therefore, barred. The Supreme Court ruled:

"The legislature intended the Dram Shop Act to afford the exclusive remedy for injuries arising out of an unlawful sale, giving away, or furnishing of intoxicants **thereby preempting all common law actions arising out of these circumstances.** The allegations in plaintiff's Complaint clearly reveal that her common law action is predicated on defendant's alleged wrongful furnishing of intoxicants to her. Therefore, her claim is preempted by the Dram Shop Act's exclusive remedy." Jackson v PKM Corporation, 430 Mich 262, 279 (1988).

In order to establish the need to strictly interpret and apply the exclusive remedy provision of the Michigan Dram Shop Act, it becomes necessary to examine its application to the facts of the Timothy Knecht case. In that case, Plaintiff's counsel engaged pleading practice which went beyond mere creativity – it is a blatant abuse of MCR 2.114(C) requiring some reasonable belief

that the allegations are true or may be supported by the present law of the State of Michigan. Unfortunately due to the uncertainty of the present state of law in Michigan as it relates to the Dram Shop Act and Common Law theories, trial judges are reluctant to rule against the so-called Common Law allegation even though the Trial Court may observe:

**THE COURT :**     **“There are (they’re) beyond anything I’ve ever seen in 21 years, but that’s okay.”**

Even though Plaintiff Knecht has attempted to plead every possible common law violation under the sun, a fair and just review of Plaintiff’s Complaint herein leads to only one conclusion: that Plaintiff’s **claims arise out of an automobile accident** due to the fact that **an intoxicated minor was operating an automobile.**

None of the alleged breaches found in Count VIII of Plaintiff’s Complaint are **reasonably related** to an automobile accident which occurred **more than four hours after** Defendant CROSS left Defendant’s premises. The cause of this accident/injury to the Plaintiff decedent was an intoxicated Minor operating an automobile. To allow Plaintiff KNECHT to plead a common law cause of action against Defendants QUICK-SAV only serves to nullify the exclusive remedy provision of the Dram Shop Act in contravention of the Michigan legislative intent.

## CONCLUSION

When one sees how extreme Plaintiff's representative can be when attempting to circumvent the exclusive remedy provision of the Michigan Dram Shop Act, it becomes abundantly clear that this Court should render an Opinion overturning Manuel v Weisman, supra, and finally give the Bench and Bar of the State of Michigan strict interpretation to the exclusive remedy provision (10) of the Michigan Dram Shop Act which would preclude the necessity of higher courts delving into the specific facts of each case before liquor license holders may be afforded the protection intended by the exclusive remedy provision of the Dram Shop Act. If the selling, giving or furnishing of alcoholic liquor is a contributing factor in a cause of action against the liquor license holder, then the exclusive remedy provision must apply. To allow or follow any other rule would only serve to eviscerate the exclusive remedy provision (10) of the Michigan Dram Shop Act by requiring license holders to engage in significant expense of discovery and oftentimes appellate procedures to finally have a court recognize and apply the protection intended by the Michigan Legislature.

### RELIEF SOUGHT


WHEREFORE, Defendants QUICK-SAV FOOD STORES, LTD and QUICK-TRACKER MANAGEMENT, INC., respectfully request that this Honorable Court grant the relief requested by Defendant/Appellant, SHUSTERIC ENTERPRISES, INC., d/b/a SPEEDBOAT BAR & GRILL; to overrule Manuel v Weitzman, 386 Mich 157 (1971), and to generate a ruling and interpretation of the exclusive remedy provision (10) of the Michigan Dram Shop Act more in accordance with the legislative intent behind its enactment.

Defendants respectfully request the Supreme Court issue an unequivocal ruling declaring that no "Common Law" cause of action may be maintained against a Michigan liquor license holder other than the cause of action allowed by the Michigan Dram Shop Act (MCL 436.1801) when evidence of improper furnishing of alcohol is a contributing factor to the incident causing the damage which is the subject matter of the complaint.

Dated this 29<sup>th</sup> day of September, A. D. 2003.

Respectfully submitted,

CHASNIS, DOGGER & GRIERSON, P.C.

  
BY: JOHN A. CHASNIS  
Attorneys for Defendants/Appellants  
QUICK-SAV FOOD STORES, LTD. and  
QUICK-TRACKER MANAGEMENT, INC.



**APPENDIX TABLE OF CONTENTS**

	<b><u>PAGE(S)</u></b>
FIRST AMENDED COMPLAINT.....	01A
JANUARY 28, 2002 TRANSCRIPT OF ORAL ARGUMENT.....	18A
DEPOSITION – BRANDY DEAN .....	19A
DEPOSITION – STEPHANIE CROSS.....	27A

**A TRUE COPY**

Michael J. Carr, Clerk

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE**

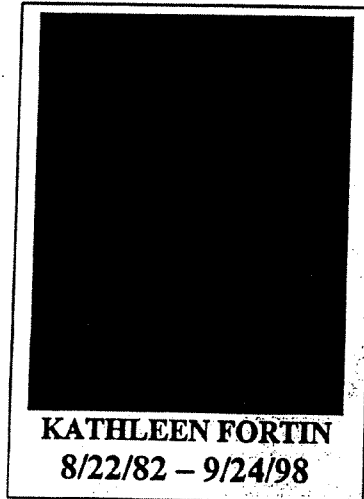
**TIMOTHY H. KNECHT as Personal  
Representative of The ESTATE OF  
KATHLEEN FORTIN, Deceased; MARY  
FORTIN; ANDREW WOODALL; KEM  
VAUGHN; HEATHER A. FORTIN;  
TAMMY WELLMAN a/ka TAMMY FORTIN;  
VERN J. FORTIN; JOANNE SHEPHERD;  
RUTH M. HARDING,**

**Plaintiffs,**

**QUICK-SAV FOOD STORES, LTD. and  
QUICK-TRACKER MANAGEMENT, INC., and  
STEPHANIE CROSS, A MINOR, BY HER  
GUARDIAN AD LITEM, SUSAN PHILPOTT-  
PREKETES; DEAN MATTHEW MIDDLETON;  
PEDRO ALFREDO ESPINOZA;**

**Defendants,**

**CASE NO. 98-64191-NI  
JUDGE JUDITH FULLERTON**



LAWRENCE J. DAY, P.C. (P-26299)  
Attorney for Plaintiff  
Citizens Banking Center  
328 S. Saginaw, Suite 9001  
Flint, MI 48502-1904  
(810) 239-0677

THOMAS A. CONNOLLY (P-26416)  
Atty. for Defs., Cross & Middleton  
1309 S. Linden road, Suite C  
P.O. Box 31500  
Flint, MI 48532  
(810) 733-0140

**FIRST AMENDED COMPLAINT AND RELIANCE ON JURY DEMAND**

**There is no other pending civil action arising out of the transaction or  
occurrence alleged in the above referenced matter.**

PLAINTIFFS, by counsel, Lawrence J. Day, P.C., state:

6-14-00

GENERAL ALLEGATIONS

1. Timothy H. Knecht is a resident of the County of Genesee and on behalf of the Estate of Kathleen Fortin brings these actions as the duly appointed Personal Representative of her Estate.
2. That at all times material hereto Kathleen Fortin, Deceased, was a resident of the County of Genesee, State of Michigan.
3. That, on information and belief Mary Fortin, Andrew Woodall, Kem Vaughn, Heather Fortin, Tammy Wellman a/k/a Tammy Fortin and Ruth M. Harding at all times material hereto have been and are residents of the County of Genesee, State of Michigan.
4. That the subject accident occurred in Genesee County, Michigan.
5. That, on information and belief, Defendant, Middleton, is and, at all times material hereto, was a resident of the County of Livingston and/or County of Genesee, State of Michigan and/or was a resident of the State of California.
6. That, on information and belief, Defendant, Cross is, and at all times material hereto, was a resident of the County of Genesee, State of Michigan and/or was a resident of the State of Tennessee.
7. That these actions are brought pursuant to MCL 600.2922, commonly known as the Michigan Wrongful Death Act and/or MCL 436.1801, commonly referred to as the Dram Shop Act and/or other statutes and/or ordinances and/or the common law of the State of Michigan. It would appear the appropriate Plaintiff, procedurally, is the Estate of Kathleen Fortin, with interested parties claiming under the named Estate. However, due to a split of authority in the Michigan Appellate Courts Plaintiffs in this First Amended Complaint include the Estate, through its Personal Representative, as well as individuals and/or interested parties who may be entitled to damages under those statutory provisions.
8. That the amount in controversy is within the jurisdiction of this Honorable Court, being in excess of \$25,000.00, exclusive of costs, interest and attorney fees for each and every cause of action alleged.
9. That each respective Defendant was negligent and/or reckless and/or grossly negligent and in breach of the duties enunciated in each respective Count of this First Amended Complaint and as a direct and a proximate result of the actions and/or inactions and breaches of duty and/or duties and/or violations of statutes and/or rules and/or ordinances and/or common law as set forth below, committed by each Defendant herein the interested parties as specified in MCL 600.2922 (3) and/or MCL 436.1801 have suffered severe mental pain and anguish, loss of Decedent's love, society and companionship, and have lost the relationship,

affection, support, services and benefits which they reasonably would have had with and/or received from Decedent, Kathleen Fortin together with other damages recoverable under MCL 600.2922 et. seq. and/or MCL 436.1801 and/or other statutes and /or Common Law of the State of Michigan and/or other governing bodies.

10. At times material hereto Defendant, Middleton, and/or Defendant, Espinoza, and/or Defendant, Cross, were on a "Joint Drunken Venture," a purpose of which included the acquisition and/or consumption and/or possession of alcohol.

**COUNT I**

**A CAUSE OF ACTION AGAINST STEPHANIE CROSS, THROUGH HER  
GUARDIAN AD LITEM, FOR NEGLIGENCE AND/OR GROSS NEGLIGENCE**

11. That Plaintiff hereby reaffirms realleges, adopts and incorporates the allegations in the other Counts and portions of this First Amended Complaint insofar as they are necessary to and consistent with the cause of action alleged in this Count.
12. That on or about September 24, 1998 at approximately 4:11 a.m. Defendant, Stephanie Cross, was operating a motor vehicle in a southerly direction on Whitaker near its intersection with Owen Road in Genesee County, Michigan. Kathleen Fortin was a passenger in the rear seat, driver's side of the motor vehicle operated by Stephanie Cross.
13. At said time and place Defendant, Cross, was intoxicated and/or visibly intoxicated and/or had been drinking alcohol and/or was exceeding the speed limit and/or did not stop for a stop sign and/or traffic signal and/or failed to yield the right of way to traffic on Owen Road and/or was otherwise operating said vehicle carelessly, negligently, recklessly and/or grossly negligently and as a direct and a proximate result did collide with a motor vehicle proceeding westbound on Owen Road.
14. That Defendant, Stephanie Cross, owed a duty of reasonable care and other duties to Kathleen Fortin pursuant to the statutes and common law of the State of Michigan that said Defendant breached as set forth below.
15. That Stephanie Cross was then and there guilty of one or more of the following careless, negligent, reckless and/or grossly negligent acts and/or omissions in the operation of the motor vehicle which she was driving in breach of the duties and rules of the common law and/or statutes of the State of Michigan, for reasons including but not limited to:
  - A. Failing to have said motor vehicle under control;

- B. Failing to stop within the assured clear distance ahead;
  - C. Driving carelessly and heedlessly, in willful and wanton disregard of the rights and safety of others;
  - D. Failing to yield the right of way to traffic on Owen Road;
  - E. Failing to stop for a stop sign and/or traffic signal;
  - F. Driving at an excessive rate of speed;
  - G. Driving while under the influence of alcohol and/or while intoxicated and/or while visibly intoxicated;
  - H. Failing to use reasonable care as would an ordinarily prudent person under like or similar circumstances;
  - I. Other reasons which will be shown through investigation, discovery, trial, and/or other avenues;
  - J. Driving while visibly intoxicated and/or while under the influence of alcohol and/or and without a driver's license and/or permit and/or without proper training and instruction, at the age of 15 years.
16. That Susan Philpott-Preketes or some other suitable person is and/or will be the duly nominated and/or appointed fiduciary, ("Guardian Ad Litem") per MCR 2.201(1)(c) and MCR 2.201(2)(a)(i) and/or (iii), for Stephanie Cross, a minor, who was born on June 9, 1983.

WHEREFORE, Plaintiffs pray for a judgment against Defendant, Stephanie Cross, a minor, through her Guardian Ad Litem, in an amount within the jurisdiction of this Honorable Court and found to be just and fair by the trier of fact, together with costs, interest and attorney fees as allowed by law.

**COUNT II**  
**CAUSE OF ACTION AGAINST DEFENDANT, DEAN MATTHEW**  
**MIDDLETON, AS AN OWNER OF A VEHICLE PURSUANT TO MCL 257.401;**  
**MSA 9.2101**

17. That Plaintiff hereby reaffirms, realleges, adopts and incorporates the allegations in the other Counts and portions of this First Amended Complaint insofar as they are necessary to and consistent with the cause of action alleged in this Count.

## FIRST AMENDED COMPLAINT

18. On information and belief, Defendant, Dean Matthew Middleton, was an owner of the vehicle being operated by Stephanie Cross at the time of said accident as described in this First Amended Complaint.
19. That Stephanie Cross was driving said motor vehicle with the express and/or implied consent and/or permission and/or knowledge of Defendant, Dean Matthew Middleton, at said time and place. Moreover, Defendant, Middleton, was also a passenger in said vehicle at the time of said accident.
20. That pursuant to MCL 257.401; MSA 9.2101, Defendant, Middleton, as an "owner" of said vehicle, is liable for all injuries and damages which were occasioned by the negligent and/or grossly negligent operation of said motor vehicle by Stephanie Cross.

WHEREFORE, Plaintiffs pray for a judgment against Defendant, Dean Matthew Middleton, in an amount within the jurisdiction of this Honorable Court and found to be just and fair by the trier of fact, together with costs, interest and attorney fees as allowed by law.

### COUNT III

#### A CAUSE OF ACTION AGAINST DEAN MATTHEW MIDDLETON ARISING OUT OF THE NEGLIGENT PROVIDING OF ALCOHOL TO A MINOR

21. That Plaintiff hereby reaffirms realleges, adopts and incorporates the allegations in the other Counts and portions of this First Amended Complaint insofar as they are necessary to and consistent with the cause of action alleged in this Count.
22. That Defendant, Middleton, owed a duty of reasonable care and other duties to Kathleen Fortin and others pursuant to the statutes and common law of the State of Michigan that said Defendant breached as set forth below.
23. That Dean Matthew Middleton was then and there guilty of one or more of the following careless, negligent, reckless and/or grossly negligent acts and/or omissions which were a direct and proximate cause of the death of Kathleen Fortin and the damages and injuries suffered contrary to and in breach of the duties and rules of the common law and/or statutes of the State of Michigan, for reasons including but not limited to:
  - A. Providing alcohol to Stephanie Cross, a minor and/or visibly intoxicated person;
  - B. Providing alcohol to a minor, Stephanie Cross, at a time when she was intoxicated and/or visibly intoxicated and/or had been drinking alcohol and/or was under the influence of alcohol;

FIRST AMENDED COMPLAINT

- C. Providing alcohol to a minor, Stephanie Cross, at a time when he, Dean Matthew Middleton, and/or his "Joint Drunken Venturer," Pedro Alfredo Espinoza was/were intoxicated and/or visibly intoxicated and/or had been drinking alcohol and/or were under the influence of alcohol and/or when they knew or should have known they were otherwise incapable of making reasonably prudent decisions;
- D. Acting as an agent and/or sub-agent and/or joint venturer and/or disclosed agent of Defendant, Espinoza, and/or Defendant, Quick-Sav Food Stores, Ltd., and/or Defendant, Quick-Tracker Management, Inc., and/or Defendant, Stephanie Cross, and/or acting as a disclosed agent and/or sub-agent and/or disclosed joint venturer of some and/or all of said Defendants in the selling and/or furnishing and/or giving of alcohol to Stephanie Cross, a minor and/or visibly intoxicated person;
- E. Failing to use reasonable care as would an ordinarily prudent person under like or similar circumstances;
- F. Other reasons which will be shown through investigation, discovery, trial, and/or other avenues;

WHEREFORE, Plaintiffs pray for a judgment against Defendant, Dean Matthew Middleton, in an amount within the jurisdiction of this Honorable Court and found to be just and fair by the trier of fact, together with costs, interest and attorney fees as allowed by law.

**COUNT IV**  
**A CAUSE OF ACTION AGAINST DEAN MATTHEW MIDDLETON ARISING**  
**OUT OF THE NEGLIGENT ENTRUSTMENT OF A MOTOR VEHICLE TO A**  
**MINOR**

- 24. That Plaintiff hereby reaffirms realleges, adopts and incorporates the allegations in the other Counts and portions of this First Amended Complaint insofar as they are necessary to and consistent with the cause of action alleged in this Count.
- 25. That Defendant, Middleton, owed a duty of reasonable care and other duties to Kathleen Fortin and motorists and their passengers, pursuant to the statutes and common law of the State of Michigan that said Defendant breached as set forth herein.
- 26. That Dean Matthew Middleton was then and there guilty of one or more of the following careless, negligent, reckless and/or grossly negligent acts and/or omissions which were a direct and proximate cause of the death of Kathleen Fortin and the damages and injuries suffered contrary to and in breach of the

## FIRST AMENDED COMPLAINT

duties and rules of the common law and/or statutes of the State of Michigan, for reasons including but not limited to:

- A. Providing alcohol to Stephanie Cross, a minor and/or visibly intoxicated person and then entrusting the operation of a motor vehicle to Stephanie Cross, a minor, when he knew and/or should have known that she was an unqualified, unlicensed driver, who was intoxicated and/or visibly intoxicated and/or had been drinking alcohol and/or was under the influence of alcohol at a time when it was reasonably foreseeable she would cause an accident while operating said motor vehicle.
- B. Making a decision to entrust his motor vehicle to Stephanie Cross at a time when he, Dean Matthew Middleton, and/or his "Joint Drunken Venturer," Pedro Alfredo Espinoza, were intoxicated and/or visibly intoxicated and/or had been drinking alcohol and/or were under the influence of alcohol and/or when they knew or should have known they were otherwise incapable of making reasonably prudent decisions;
- C. Failing to use reasonable care as would an ordinarily prudent person under like or similar circumstances;
- D. Acting as an agent and/or sub-agent and/or joint venturer of Defendant, Espinoza, in allowing and permitting the operation of said vehicle by Defendant, Cross.
- E. Other reasons which will be shown through investigation, discovery, trial, and/or other avenues;

WHEREFORE, Plaintiffs pray for a judgment against Defendant, Dean Matthew Middleton, in an amount within the jurisdiction of this Honorable Court and found to be just and fair by the trier of fact, together with costs, interest and attorney fees as allowed by law.

### COUNT V

#### A CAUSE OF ACTION AGAINST PEDRO ALFREDO ESPINOZA ARISING OUT OF THE NEGLIGENT PROVIDING OF ALCOHOL TO A MINOR

- 27. That Plaintiff hereby reaffirms realleges, adopts and incorporates the allegations in the other Counts and portions of this First Amended Complaint insofar as they are necessary to and consistent with the cause of action alleged in this Count.
- 28. That Defendant, Espinoza, owed a duty of reasonable care and other duties to Kathleen Fortin and others pursuant to the statutes and common law of the State of Michigan that said Defendant breached as set forth below.



## FIRST AMENDED COMPLAINT

29. That Pedro Alfredo Espinoza was then and there guilty of one or more of the following careless, negligent, reckless and/or grossly negligent acts and/or omissions which were a direct and proximate cause of the death of Kathleen Fortin and the damages and injuries suffered contrary to and in breach of the duties and rules of the common law and/or statutes of the State of Michigan, for reasons including but not limited to:
- A. Providing alcohol to Stephanie Cross, a minor and/or a visibly intoxicated person;
  - B. Providing alcohol to a minor, Stephanie Cross, at a time when she was intoxicated and/or visibly intoxicated and/or had been drinking alcohol and/or was under the influence of alcohol;
  - C. Providing alcohol to a minor, Stephanie Cross, at a time when he, Pedro Alfredo Espinoza, and/or his "Joint Drunken Venturer," Dean Matthew Middleton were intoxicated and/or visibly intoxicated and/or had been drinking alcohol and/or were under the influence of alcohol and/or when they knew or should have known they were otherwise incapable of making reasonably prudent decisions;
  - D. Acting as an agent and/or sub-agent and/or joint venturer and/or disclosed agent of Defendant, Middleton, and/or Defendant, Quick-Sav Food Stores, Ltd., and/or Defendant, Quick-Tracker Management, Inc., and/or Defendant, Stephanie Cross, and/or acting as a disclosed agent and/or sub-agent and/or disclosed joint venturer of some and/or all of said Defendants in the selling and/or furnishing and/or giving of alcohol to Stephanie Cross, a minor and/or visibly intoxicated person;
  - E. Failing to use reasonable care as would an ordinarily prudent person under like or similar circumstances;
  - F. Other reasons which will be shown through investigation, discovery, trial, and/or other avenues;

WHEREFORE, Plaintiffs pray for a judgment against Defendant, Pedro Alfredo Espinoza, in an amount within the jurisdiction of this Honorable Court and found to be just and fair by the trier of fact, together with costs, interest and attorney fees as allowed by law.

COUNT VI  
A CAUSE OF ACTION AGAINST PEDRO ALFREDO ESPINOZA ARISING  
OUT OF THE NEGLIGENT ENTRUSTMENT OF A MOTOR VEHICLE TO A  
MINOR

## FIRST AMENDED COMPLAINT

30. That Plaintiff hereby reaffirms realleges, adopts and incorporates the allegations in the other Counts and portions of this First Amended Complaint insofar as they are necessary to and consistent with the cause of action alleged in this Count.
31. That Defendant, Espinoza, owed a duty of reasonable care and other duties to Kathleen Fortin and motorists and their passengers, pursuant to the statutes and common law of the State of Michigan that said Defendant breached as set forth below.
32. That Defendant, Espinoza, was then and there guilty of one or more of the following careless, negligent, reckless and/or grossly negligent acts and/or omissions which were a direct and proximate cause of the death of Kathleen Fortin and the damages and injuries suffered contrary to and in breach of the duties and rules of the common law and/or statutes of the State of Michigan, for reasons including but not limited to:
  - A. Providing alcohol to Stephanie Cross, a minor and/or visibly intoxicated person;
  - B. Entrusting the operation of a motor vehicle to Stephanie Cross, a minor, when he knew and/or should have known that she was an unqualified, unlicensed driver, who was intoxicated and/or visibly intoxicated and/or had been drinking alcohol and/or was under the influence of alcohol when it was reasonably foreseeable she would cause an accident while operating said motor vehicle;
  - C. Making a decision to entrust a motor vehicle to Stephanie Cross at a time when he, Pedro Alfredo Espinoza, and/or his "Joint Drunken Venturer," Dean Matthew Middleton, were intoxicated and/or visibly intoxicated and/or had been drinking alcohol and/or were under the influence of alcohol and/or when they knew and/or should have known they were otherwise incapable of making reasonable decisions and/or when Espinoza knew the owner of said vehicle, Middleton, was incapable of making a reasonably prudent decisions;
  - D. Acting as an agent and/or sub-agent and/or joint venturer of Defendant, Middleton, in allowing and permitting the operation of said vehicle by Defendant, Cross.
  - E. Failing to use reasonable care as would an ordinarily prudent person under like or similar circumstances;
  - F. Other reasons which will be shown through investigation, discovery, trial, and/or other avenues;

## FIRST AMENDED COMPLAINT

WHEREFORE, Plaintiffs pray for a judgment against Defendant, Pedro Alfredo Espinoza, in an amount within the jurisdiction of this Honorable Court and found to be just and fair by the trier of fact, together with costs, interest and attorney fees as allowed by law.

### COUNT VII

DRAM SHOP CAUSE OF ACTION AGAINST QUICK-SAV FOOD STORES, LTD  
and/or QUICK-TRACKER MANAGEMENT, INC. and/or COMMON LAW CAUSE  
OF ACTION FOR PROVIDING ALCOHOL TO A MINOR (This cause of action is  
based upon the furnishing of alcohol.)

33. That Plaintiffs hereby reaffirm, reallege, adopt and incorporate the allegations in the other Counts and portions of this First Amended Complaint insofar as they are necessary to and consistent with the cause of action alleged in this Count.
34. That reference to Defendant, Quick-Sav Food Stores, Ltd., throughout this First Amended Complaint (referred to as "Quick-Sav") shall be meant to include the clerks, agents, servants, subagents, joint venturers and/or employees of said Defendant.
35. That reference to Defendant, Quick-Tracker Management, Inc., throughout this First Amended Complaint (referred to as "Quick-Tracker") shall be meant to include the clerks, agents, servants, subagents, joint venturers and/or employees of said Defendant.
35. That Quick-Sav and/or Quick-Tracker at all times material hereto, was registered to do business in the State of Michigan and/or licensed in the State of Michigan as a retailer of alcohol, located and doing business in Genesee County, Michigan and/or otherwise in the business of selling and/or providing and/or giving and/or furnishing alcohol at various premises including its' location at or near 110 E. Broad Street, in the Village of Linden, Genesee County, Michigan.
36. On the night before and/or the morning of the accident described above, Stephanie Cross and/or Dean Matthew Middleton and/or Pedro Alfredo Espinoza were sold and/or furnished and/or given alcohol by Quick-Sav and/or Quick-Tracker while each and/or all of them were visibly intoxicated, in breach of the duties set forth in MCL 436.1701 and/or 436.1801, et seq. Moreover, Defendant, Cross, was a minor, 15 years old.

## FIRST AMENDED COMPLAINT

37. The selling and/or furnishing and/or giving, of alcohol to Defendants, Cross, a minor and/or visibly intoxicated person, and/or Middleton, a visibly intoxicated person, and/or Espinoza, a visibly intoxicated person, by Defendant, Quick-Sav, and/or Defendant, Quick-Tracker, was a direct and a proximate cause of the accident and injuries and damages complained of herein.
38. That the selling and/or furnishing and/or providing of alcohol to Stephanie Cross and/or Pedro Alfredo Espinoza and/or Dean Matthew Middleton under the circumstances described above and as will be shown through discovery was/were a direct and a proximate cause of the injuries and/or death and/or damages sustained for which Quick-Sav and/or Quick-Tracker is/are liable pursuant to MCL 436.1801 and MCLA 600.2922 and/or other statutes and/or the common law of the State of Michigan.
39. That Stephanie Cross, a minor and/or visibly intoxicated person, consumed alcohol on the premises of Quick-Sav and/or Quick-Tracker in the hours leading up to Kathleen Fortin's death and drank beer in a room behind the checkout counter of the Quick-Sav, and/or Quick-Tracker, all with the full knowledge and/or consent of Quick-Sav's and/or Quick-Tracker's on duty clerk.
40. That Quick-Sav and/or Quick-Tracker through it's clerks, agents, servants and/or employees knew and/or should have known that, when it furnished alcohol to Middleton and/or Espinoza, it was furnishing alcohol to Stephanie Cross, a minor and/or visibly intoxicated person who was on the Quick-Sav Premises at the same time.
41. Specifically, the Quick-Sav and/or Quick-Tracker Clerk that night, prior to her second furnishing and/or giving and/or selling of alcohol to Defendants, several hours after the first selling and/or furnishing and/or giving, knew and/or should have known that:
  - A. Stephanie Cross had been drinking beer inside the Quick-Sav Store;
  - B. The beer Stephanie Cross drank on the Quick-Sav Premises had come from the beer she (the Quick-Sav Clerk) had sold and/or given and/or furnished earlier to Defendants, including Stephanie Cross and/or in the presence of Stephanie Cross;
  - C. Stephanie Cross had ridden with Middleton and Espinoza in Middleton's car earlier that evening departing with them from the Quick-Sav after they had been sold and/or furnished and/or given beer there the first time
42. In spite of the Clerk's prior knowledge and the circumstances described above the Quick-Sav and/or Quick-Tracker Clerk furnished a second case and/or box of beer to Defendants while each and/or all of them were visibly intoxicated, in breach of the duties set forth in MCL 436.1801, et seq and/or the common law. Moreover,

## FIRST AMENDED COMPLAINT

Defendant, Cross, was a minor, 15 years old and the Quick-Sav Clerk was aware of this fact. •

43. That as a direct and a proximate result of the actions and inactions and breaches of duty and/or violations of statutes and/or rules and/or ordinances and/or common law by Defendant, Quick-Sav, and/or Defendant, Quick-Tracker, Kathleen Fortin was fatally injured and the interested parties as specified in MCL 600.2922 (3) and/or MCL 436.1801 have suffered severe mental pain and anguish, loss of Decedent's love, society and companionship, and have lost the relationship, affection, support, services and benefits which they reasonably would have had with and/or received from Decedent, Kathleen Fortin together with other damages recoverable under MCL 600.2922 and/or MCL 436.1801 of the State of Michigan and/or other governing bodies.

WHEREFORE, Plaintiffs pray for a judgment against Defendant, Quick-Sav Food Stores, Ltd., and/or Defendant, Quick-Tracker, in an amount within the jurisdiction of this Honorable Court and found to be just and equitable by the trier of fact, together with costs, interest and attorney fees.

### COUNT VIII

PREMISES LIABILITY AND/OR NEGLIGENCE AND/OR GROSS  
NEGLIGENCE AND/OR SOCIAL HOST LIABILITY AND/OR NUISANCE  
AGAINST QUICK-SAV, AND/OR QUICK-TRACKER  
(This cause of action is not based upon the furnishing of alcohol.)

44. That Plaintiffs hereby reaffirm, reallege, adopt and incorporate the allegations in the other Counts and portions of this First Amended Complaint insofar as they are necessary to and consistent with the cause of action alleged in this Count.
45. That reference to Defendant, Quick-Sav Food Stores, Ltd., (referred to as "Quick-Sav") shall be meant to include the clerks, agents, servants, subagents, joint venturers and/or employees and/or officers of said Defendant.
46. That reference to Defendant, Quick-Tracker Management, Inc., throughout this First Amended Complaint (referred to as "Quick-Tracker") shall be meant to include the clerks, agents, servants, subagents, joint venturers and/or employees of said Defendant.
47. Quick-Sav and/or Quick-Tracker, by and through the acts and/or omissions of its clerks and/or agents and/or employees and/or servants, allowed and/or encouraged Stephanie Cross, a 15 year old minor, and other minors to congregate on its premises and/or consume alcohol and/or to possess alcoholic liquor for personal consumption

## FIRST AMENDED COMPLAINT

on the premises of Quick-Sav and/or Quick-Tracker in violation of the statutes and/or common law and/or applicable ordinances and/or rules and regulations.

48. That Quick-Sav and/or Quick-Tracker negligently and/or recklessly and/or grossly negligently and/or willfully and/or wantonly breached the following duties:

- A. A duty to reasonably control the premises;
- B. A duty not to allow a person who is under 21 years of age to consume alcoholic liquor and/or to possess alcoholic liquor for personal consumption on the premises per the common law and/or per Michigan Liquor Control Commission Administrative Rule 436.1009(1);
- C. A duty not to allow a minor, less than 18 years of age to consume alcoholic liquor and/or to possess alcoholic liquor for personal consumption on the premises per the common law and/or rules and/or ordinances and/or Public Policy of the State of Michigan and/or other governing bodies;
- D. A duty not to contribute to the delinquency of minors per pertinent portions of Title 9 of The City of Linden Municipal Code, which states in pertinent part, "Any person who, by any act or by any work, encourages, contributes toward, causes or tends to cause any minor child under the age of seventeen years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court...is guilty of a misdemeanor. (Ord 44, Sec 1, 1969)" [Linden Municipal Code Section 9.28.010]

**"...For purposes of this chapter, a boy or girl under the age of seventeen years shall be considered to come under the jurisdiction of the probate court if the boy or girl is one:**

- a. **Who has violated any municipal ordinance or law of the state or of the United States; or**
- b. **Who has deserted his home without sufficient cause, or who is repeatedly disobedient to the reasonable and lawful commands of his parents, guardian or other custodian; or**
- c. **Who has repeatedly associated with immoral persons, or who is leading an immoral life, or is found on premises occupied or used for illegal purposes; or**
- d. **Who, being required by law to attend school, willfully and repeatedly absents himself therefrom, or repeatedly violates rules and regulations thereof; or**

## FIRST AMENDED COMPLAINT

- e. Who habitually idles away his or her time; or
- f. Who repeatedly patronizes or frequents any tavern or place where the principal purpose of the business conducted is the sale of alcoholic liquors. (Ord 44, Sec 2, 1969)" [Linden Municipal Code Section 9.28.020]

"...It is unlawful for any person under the age of twenty-one years to...knowingly possess...any beer..." [Linden Municipal Code Section 9.28.030, paragraph A]

"...It is unlawful for any minor under the age of sixteen years to loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds or other public places, public buildings, places of amusement and entertainment, vacant lots or other unsupervised places between the hours of 11:00 p.m. and 6:00 a.m. of the following day." [Linden Municipal Code Section 9.28.050, entitled "Curfew"]

- E. A duty not to create a hangout or nuisance and/or attractive nuisance for minors and/or loitering minors who foreseeably would be attracted to congregate for social purposes on a premises where possession and/or consumption of cigarettes and/or alcohol are known to be permitted and/or allowed and/or encouraged;
- F. A duty not to allow adults and/or intoxicated adults on its premises who have known propensities for corrupting minors and/or contributing to the delinquency of minors and/or who foreseeably would attempt to corrupt minors;
- G. A duty to take reasonable action and/or corrective action within a reasonable period of time to remove such minors and/or adults as described in this First Amended Complaint;
- H. A duty to provide reasonable protection and/or supervision and/or corrective action and/or reasonable safety precautionary measures and/or security and/or security cameras to protect invitees and/or persons and/or minors with whom it had a "special relationship" and/or minors and/or the general public, including Kathleen Fortin, from the reasonably foreseeable risks and/or consequences of the activities and/or inherently dangerous activities which were encouraged and/or allowed on the Quick-Sav and/or Quick-Tracker Premises as described;

## FIRST AMENDED COMPLAINT

- I. A duty to take reasonable precautionary measures and/or corrective action to deter the type of activities which were allowed to occur on the Premises on September 23<sup>rd</sup> and 24<sup>th</sup>, 1998 and to reduce and/or prevent the foreseeable risks and/or consequences flowing from such activities and/or special circumstances and/or special relationships and/or activities and/or inherently dangerous activities, including the death of persons, such as Kathleen Fortin;
- J. In general, a duty not to allow and/or by no means encourage, those activities which attracted minors to use its store as a social gathering place for the possession and/or consumption of alcohol and/or cigarettes and/or a duty not to provide an opportune meeting place for minors and/or adults set on corrupting them and/or contributing to their delinquency;
- K. A duty to use reasonable care as would an ordinarily prudent person and/or corporate chain convenience store under like and/or similar circumstances;
- L. Other duties under the premises laws and/or common law and/or rules and/or statutes and/or ordinances and/or the Public Policy of the State of Michigan and/or other governing bodies;
- M. Duties to use reasonable care as would an ordinarily prudent person and/or corporate chain convenience store under like and/or similar circumstances in the hiring, training and/or supervising of qualified personnel to conduct business in a reasonably prudent and safe manner and under the same and/or similar circumstances as described herein.
- N. A duty not to knowingly allow a minor to consume or possess an alcoholic beverage at a social gathering on Defendant's, Quick-Sav, Premises per the reasonably prudent standard of the common law and/or per the standards and/or dictates of MCL 750.141a(2) et. seq.
- O. A duty to take "corrective action" as set forth and defined in the subparts of MCL 750.141a by:
  - (i) **Making a prompt demand that the minor or other individual depart from the premises, residence, or other real property, or refrain from the unlawful possession or consumption of the alcoholic beverage or controlled substance on or within that premises, residence, or other real property, and taking additional action described in subparagraph (ii) or (iii) if the minor or other individual does not comply with the request.**
  - (ii) **Making a prompt report of the unlawful possession or consumption of alcoholic liquor or a controlled substance to a law enforcement agency having jurisdiction over the violation.**



FIRST AMENDED COMPLAINT

- (iii) **Making a prompt report of the unlawful possession or consumption of alcoholic liquor or a controlled substance to another person having a greater degree of authority or control over the conduct of persons on or within the premises, residence, or other real property.**

P. Duties to comply with the pertinent provisions of MCL 750.141a et. seq., effective June 1, 1994;

Q. A duty not to contribute to the neglect or delinquency of children under the age of 17 years as set forth in MCL 750.145.

49. That Quick-Sav and/or Quick-Tracker breached the above duties and knew and/or should have known of the foreseeable perils posed by such activities, as described above, to the general public, including Kathleen Fortin;

50. That, at all times and/or at various times pertinent hereto a "special relationship" existed and/or arose between Stephanie Cross and/or Quick-Sav and/or Quick-Tracker and/or Kathleen Fortin that created and/or enhanced the duties Quick-Sav and/or Quick-Tracker owed. Said "special relationship" and commensurate duties, as set forth above, arose and/or existed by virtue of factors including, but not limited to the following;

A. Quick-Sav's and/or Quick-Tracker's Clerk personally knew Defendant, Cross, her brother and other minors who gathered at said premises on the dates in question;

B. The serious nature of the risks presented and/or the foreseeability of the potential for harm caused by the above circumstances and/or conditions and/or activities was obvious;

C. The burden on Defendant, Quick-Sav and/or Quick-Tracker to reasonably reduce and/or prevent the foreseeable risks of harm by complying with the above stated duties was small compared to the seriousness of the risks created by the circumstances described.

D. Other factors that will be shown through the process of discovery and/or trial and/or other avenues.

51. That at all times and/or at various times material hereto during the events leading up to the death of Kathleen Fortin all of the Defendants were companions engaged in a common undertaking to corrupt and/or contribute to the delinquency of minors.

52. That as a direct and a proximate result of the actions and inactions and breaches of duties and/or special duties and/or violations of statutes and/or rules and/or

FIRST AMENDED COMPLAINT

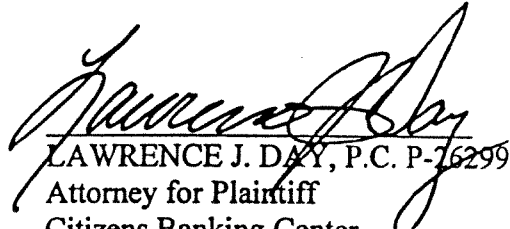
ordinances and/or common law by Defendant, Quick-Sav and/or Defendant, Quick-Tracker, Kathleen Fortin was fatally injured and the interested parties as specified in MCL 600.2922 (3) have suffered severe mental pain and anguish, loss of Decedent's love, society and companionship, and have lost the relationship, affection, support, services and benefits which they reasonably would have had with and/or received from Decedent, Kathleen Fortin together with other damages recoverable under MCL 600.2922 and/or Common Law of the State of Michigan and/or other governing bodies.

52. That at all times material the personnel in charge of the Quick-Sav convenience store in question were employees and/or agents and/or servants of Defendant Quick-Sav and/or Defendant, Quick-Tracker

**GENERAL PRAYER FOR RELIEF INCORPORATED INTO EACH AND EVERY  
COUNT OF THIS FIRST AMENDED COMPLAINT**

WHEREFORE, Plaintiffs, pray for a Judgment against each and every Defendant in an amount within the jurisdiction of this Honorable Court and found to be just and equitable by the trier of fact, together with costs, interest and attorney fees and any other relief, including Declaratory Relief deemed appropriate.

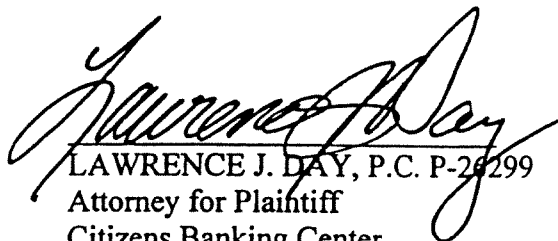
Date: 9/19/00

  
LAWRENCE J. DAY, P.C. P-76299  
Attorney for Plaintiff  
Citizens Banking Center  
328 S. Saginaw, Suite 9001  
Flint, MI 48502-1904  
(810) 239-0677

**RELIANCE ON JURY DEMAND PREVIOUSLY REQUESTED**

Plaintiffs respectfully rely on the Jury Demand previously requested.

Date: 9/19/00

  
LAWRENCE J. DAY, P.C. P-76299  
Attorney for Plaintiff  
Citizens Banking Center  
328 S. Saginaw, Suite 9001  
Flint, MI 48502-1904  
(810) 239-0677

1           THE COURT: We cleared up, hopefully, the issues  
2           regarding--

3           MR. CHASNIS: If we--if we can clear up these  
4           issues so I know which ones are viable after today, then  
5           I would make another motion if the Court would accept it  
6           after the deadline.

7           THE COURT: It's all right with me. I don't  
8           care.

9           MR. CHASNIS: The--does the Court wish me to ar-  
10          gue the Dram Shop violation?

11          THE COURT: Do you want to?

12          MR. CHASNIS: If--if the Court--

13          THE COURT: He has--I mean, again, his theories  
14          are extremely unusual, let's face it.

15          MR. CHASNIS: And because of that--

16          THE COURT: There are beyond anything I've ever  
17          seen in 21 years, but that's okay.

18          MR. CHASNIS: The problem being that--well, let  
19          me make my presentation, maybe it will make it clear--

20          THE COURT: Yep, okay. Well, I--I didn't--I  
21          thought the briefs were both very good.

22          MR. CHASNIS: Your Honor, this case involves an  
23          automobile accident which occurred at 4:18 a.m. on Sep-  
24          tember the 24th, 1998. The complaints against the de-  
25          fendant all deal with events that occurred the day

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

TIMOTHY H. KNECHT, as Personal  
Representative of The ESTATE OF  
KATHLEEN FORTIN, Deceased;  
MARY FORTIN; ANDREW WOODALL;  
KEN VAUGHN; HEATHER A. FORTIN;  
TAMMY WELLMAN a/k/a TAMMY FORTIN;  
VERN J. FORTIN; JOANNE SHEPHERD;  
RUTH M. HARDING,

Plaintiffs,

-v-

Case No. 98-64191-NI

QUICK-SAV FOOD STORES, LTD.,  
and QUICK-TRACKER MANAGEMENT,  
INC., and STEPHANIE CROSS,  
A MINOR, BY HER GUARDIAN AD  
LITEM, SUSAN PHILPOTT-PREKETES;  
DEAN MATTHEW MIDDLETON;  
PEDRO ALFREDO ESPINOZA,

HON. JUDITH FULLERTON

Defendants.

The Videotape Deposition of BRANDY S. DEAN,  
was taken before me, Timothy J. Boroski, RPR-CSR-2378,  
Notary Public in and for the County of Eaton, acting in  
the County of Genesee, State of Michigan, at the offices  
of Ripka, Boroski & Associates, 717 South Grand Traverse,  
Flint, Michigan, on Monday, October 22, 2001, commencing  
at or about 12:00 p.m.

1 Q. All right. When you worked the third shift at the  
2 Broad and Bridge Street store, what time did your  
3 shift start?

4 A. About -- it's -- originally -- technically started at  
5 10 o'clock. But I showed up about 9:00 or 9:30  
6 usually. Because you have to do a lot of things to  
7 prepare to get things started.

8 Q. All right. When you worked that shift that  
9 technically started at 10:00 but you arrived a little  
10 earlier before that, did someone else end their shift  
11 at 10:00 or was there a layover or overlapping? Tell  
12 me about that.

13 A. Well, we -- the shift change was at 10 o'clock where  
14 she would punch herself out, you know, like do her  
15 paperwork of the day's events of when she worked.

16 Q. Are you talking about the person that was before you?

17 A. Yes.

18 Q. What was her name, do you remember?

19 A. Brooke. I just remember Brooke. I know her name was  
20 Brooke.

21 Q. If I told you it was Brooke Meyers, does that ring a  
22 bell or don't you know what her last name was?

23 A. I've heard people say that that's what her name was.  
24 But I didn't know personally that that was her name.

25 Q. But you knew it was Brooke something?

1 A. Probably about ten or fifteen minutes prior to it.

2 Q. Ten or fifteen minutes would be twenty to 12:00?

3 A. About 11:30, maybe, 11:35.

4 Q. Okay. So you think that --

5 A. I guess that would be twenty, twenty-five minutes.

6 But it was around that time.

7 Q. Do you think twenty-five minutes passed from the time  
8 that he bought the beer until the time you called  
9 911 then?

10 A. Yes.

11 Q. Okay. When Mr. Espinoza came in and bought beer at  
12 around 11:30 or 11:35 p.m. on September 23rd, 1998,  
13 was Brooke, the other person that was working there,  
14 was she still there?

15 A. Yes.

16 Q. Now, her shift ended at 10 o'clock but she was still  
17 there an hour and-a-half later?

18 A. Yes. It takes about an hour and-a-half to two hours  
19 to close up your own shift. You have to count your  
20 money and put it in the computer and all of that  
21 stuff, too, so...

22 Q. All right.

23 A. There's a lot of stuff that you have to do.

24 Q. When Mr. Espinoza came in and bought alcohol on the  
25 occasion that you were there, did you ask him for

1       when you first asked her to sit in the office, did  
2       you know where she got beer from?

3   A.   She told me where -- that she had got it from a  
4       party. But I didn't know -- I never seen her go  
5       anywhere and get it or I didn't give it to her or  
6       anything like that.

7   Q.   Did you know before Mr. Espinoza came in to buy a box  
8       of beer -- or let me ask you this:

9               At 11:00 or 11:35 when he bought a box of  
10       beer, do you have a specific recall whether it was a  
11       six-pack, a twelve-pack, an eighteen-pack or twenty-  
12       four pack?

13   A.   It was an eighteen-pack.

14   Q.   Okay. Before he came in to buy the -- do you  
15       remember specifically, was it an eighteen-pack, or is  
16       that your best guess?

17   A.   No, I know. I remember that part.

18   Q.   Okay. Before he came in to buy the eighteen-pack of  
19       beer at about 11:30 or 11:35, did you know whether or  
20       not Stephanie Cross got the beer that she was  
21       drinking from Mr. Middleton or Mr. Espinoza before he  
22       bought that?

23   A.   No.

24   Q.   Is the first time you saw Espinoza or Middleton when  
25       they came in about 11:30 or 11:35?

1       proceeded to walk out to the car. And she told  
2       him -- she had mentioned something about wanting to  
3       drive.

4               There was kind of a -- a -- I guess you  
5       could say conversation between the three of them  
6       about who was going to drive.

7   Q.   The three of who?

8   A.   Middleton, Espinoza and Stephanie.

9   Q.   All right.

10  A.   And then --

11  Q.   Was this in the store, by the way?

12  A.   No, this was all in the parking -- this had -- they  
13       had walked out into the parking lot when they started  
14       talking about who was going to drive.

15  Q.   Was Jim Cross there when this was going on?

16  A.   Yeah, but he didn't really say anything as to the  
17       fact or anything. He just kind of stood back and  
18       watched what was going on.

19  Q.   All right. What happened?

20  A.   I started to follow them outside because I had the  
21       feeling she was going to be leaving and driving and  
22       stuff. And I knew that she had been drinking. So I  
23       stood at the doorway with the door open and listened  
24       to their conversation as to what was going on. And,  
25       ultimately, it ended up being her -- she ended up



1       being the one who drove.

2                   And I told them not to take her because  
3       she was only fifteen. That she had been drinking.  
4       Don't let her drive. Her brother Jim, he did say  
5       something towards the end. He asked me to do  
6       something about it because he didn't want her to  
7       leave. And I didn't know what else to do besides  
8       call the police. So that's what I did.

9   Q. All right. So you called 911?

10  A. Yes.

11  Q. And what did you tell them at approximately five  
12       minutes to midnight?

13  A. I told them that there was a fifteen-year old that  
14       was leaving with two men who were over the age of  
15       twenty-one and that she had been drinking and that  
16       they were allowing her to drive. And that from the  
17       time that she left she had already been driving  
18       recklessly.

19  Q. Now, by the time you made the call to the police,  
20       during this conversation where they are all talking  
21       about who is going to drive, were you able to make a  
22       determination, based on that conversation which  
23       involved Middleton and Espinoza, were you able to  
24       make a determination at that time whether they had  
25       been drinking earlier?

1 A. Yeah, because they -- the girl that worked there  
2 other than me, Brooke, she told me that she had sold  
3 them alcohol earlier that night. And Jim had also  
4 told me that he had -- they had come in contact with  
5 them earlier that day and that they had been drinking  
6 before.

7 Q. Did you learn that after Espinoza bought the beer?

8 MR. WAUN: Objection, leading.

9 THE WITNESS: Yes.

10 MR. CHASNIS: It's not leading.

11 Q. (BY MR. CHASNIS) Did you learn that they had been  
12 drinking after they bought the beer?

13 MR. WAUN: Objection, leading.

14 THE WITNESS: Yes.

15 Q. (BY MR. CHASNIS) Okay. And did you say to the  
16 police anything about the people had been drinking?

17 A. Yes, I -- I told them that they -- he --

18 Q. All right.

19 A. -- they had all already been drinking.

20 Q. And after they left, or after you made the call at  
21 about five minutes, or four minutes to midnight, did  
22 there come a time that you made another call to the  
23 police, to 911?

24 A. Yeah, I just -- within the next ten or fifteen  
25 minutes.

1 Q. You said earlier that Espinoza and Middleton were at  
2 the store two times that night but only came in one  
3 time. What happened that they were at the store a  
4 second time while you were there?

5 A. Around 3 o'clock in the morning that same night they  
6 came back, drove up in the parking lot and motioned  
7 me out to the parking lot. And I had a conversation  
8 with Stephanie for about five minutes and then they  
9 drove off again.

10 Q. Now, that was what -- did you say what time it was?

11 A. That was about 3 o'clock in the morning.

12 Q. All right. When they--

13 A. No -- hold on, let me rephrase. It had to have been  
14 around 3:00 or 3:30 from what I remember. It was  
15 early morning.

16 Q. When they came to the store and waved you out to the  
17 parking lot at somewhere around 3:00 or 3 o'clock in  
18 the morning -- 3:00 or 3:30 in the morning -- was  
19 anybody else in the car at the time?

20 A. There was Stephanie and the -- Middleton, Espinoza  
21 and there was another girl that I didn't know.

22 Q. Okay. You have since learned that that was Kat  
23 Fortin?

24 A. Yes.

25 Q. And when they came the second time, was Jim Cross

DEPO. STEPHANIE CROSS  
TAKEN: 8-31-00

Page 97

- 1 Q. Was there any beer left?
- 2 A. I don't remember.
- 3 Q. Okay. Now, so you and Kat approach the car. Does
- 4 Kat get in the car? Obviously she did.
- 5 A. Yes.
- 6 Q. And where did she get? In the back or --
- 7 A. In the back.
- 8 Q. All right. And now, her blood alcohol test from the
- 9 hospital showed zero, showed no alcohol. Did she
- 10 have alcohol? Or don't you know?
- 11 A. I didn't remember. That's what I -- I wanted to
- 12 know that.
- 13 Q. Mm-hmm. All right. From her home, tell me your
- 14 route, you know. How do you travel?
- 15 A. I went somewhere in Fenton to one of her friends'
- 16 house. And I don't know where it was. And then I
- 17 went back to the BP.
- 18 Q. Okay. You went to one of Kat's friends' houses?
- 19 A. Yes.
- 20 Q. How far was it from her house?
- 21 A. I have no idea.
- 22 Q. And then do you next go directly to the Quick Sav
- 23 for yet a third time?
- 24 A. Yes.
- 25 Q. Again, there's something I want to ask because I'll

DEPO. STEPHANIE CROSS  
TAKEN: 8-31-00

Page 94

1 Q. Okay. Did you head back towards Linden?

2 A. I went to Kat's house.

3 Q. Okay. So you went back to Kathleen's Fortin's  
4 house, for clarity of the record?

5 A. Yes.

6 Q. And what was your intent? Why were you going there?

7 A. To get her.

8 Q. And about what time was it, do you know?

9 A. I didn't know then, but I do now. It was 4:00 --  
10 around 4 o'clock in the morning.

11 Q. What do you base that on? What have you learned  
12 since that put you in that time frame?

13 A. Because I was only -- Well, because I got in that  
14 accident at, like, 4:20. And I -- she wasn't in the  
15 car very long before that.

16 Q. Okay.

17 A. So it was around 4:00.

18 Q. And did I hear you correctly -- I'm sorry, I'm  
19 jumping a little bit now. I want to go back to this  
20 point where you're at Kathleen's house. But before  
21 that, when you left the Quick Sav and you were  
22 driving, did you go right through the same  
23 intersection where later on the accident happens?

24 A. Yes.

25 Q. Okay. And you made a left turn there at that

1 about whether or not you consumed any alcohol or  
2 anybody gave you any alcohol, is before they show  
3 up--

4 A. No, I didn't.

5 Q. -- before. Okay.

6 Now, there comes a time when  
7 these two fellows do show up at the store. How long  
8 had you been at the store before they showed up,  
9 roughly?

10 A. Not more than an hour.

11 Q. Okay. And during that time frame, which you  
12 indicated was not more than an hour, how did you  
13 spend your time? Were you chatting with Jimmy and  
14 with Brandy?

15 A. Yes.

16 Q. And were there other people there that you could  
17 talk to?

18 A. Yes.

19 Q. And were you guys going outside and enjoying the  
20 weather, or were you mostly inside the store?

21 A. In and out.

22 Q. Okay. Were you going around town, walking around,  
23 or mostly hovering right there near the Quick Sav?

24 A. Right there at the Quick Sav.

25 Q. Okay. And are there things, aside from friendships,

DEPO. STEPHANIE CROSS  
TAKEN: 8-31-00

Page 44

1 Q. Did Jimmy have a crush on Brandy or vice versa,  
2 or--

3 A. No.

4 Q. No.

5 A. I think Brandy had a crush on Jimmy, but I don't  
6 think Jimmy had a crush on Brandy.

7 Q. Okay. Now, up to this point in time, you've taken  
8 me--And thank you for going through all these  
9 steps with me -- you've taken me through the day.  
10 And now we're to the Quick Sav.

11 And up to this point in time of  
12 the day, on September 23rd, 1998, your testimony is  
13 that you haven't had any alcohol at all?

14 A. Right.

15 Q. Okay. Now, while you at the Quick Sav this first  
16 time that day, do you ever have any alcohol that  
17 first time? I understand you come back to the  
18 Quick Sav eventually. But I don't want to jump  
19 ahead of the story. I want to stay right now on the  
20 time line.

21 While you're at the Quick Sav,  
22 did you have any alcohol this first time?

23 A. No.

24 Q. Okay. And just generally, Stephanie, I wanted to  
25 ask you, did you know if Brandy would allow kids to

1 Q. Okay. Now, after you leave the park you go to your  
2 grandmother's house. Do you remember, just roughly,  
3 how long you stayed there?

4 A. Not more than a half hour.

5 Q. Okay. Was it still daylight when you were at your  
6 grandma's house?

7 A. I don't remember.

8 Q. Okay. Now, you're with Jerry. Where do you  
9 eventually go from your grandma's house? I'm just  
10 trying to move chronologically through the day.

11 A. He dropped me off at -- right downtown.

12 Q. Jerry had a car?

13 A. Yes.

14 Q. Okay.

15 A. Had a truck.

16 Q. And he dropped you off in downtown Linden?

17 A. Yes.

18 Q. At the -- What do they call that store there on the  
19 south side of the road?

20 A. BP.

21 Q. BP. And have you ever heard the term "Quick Sav"?

22 A. Yes. That, too.

23 Q. Okay. So it's like a BP gas station with a

24 Quick Sav store?

25 A. Yes.



DEPO. STEPHANIE CROSS  
TAKEN: 8-31-00

Page 39

- 1 do at the park? Were there some picnic tables there  
2 you sat on and chatted with each other? Or what did  
3 you do?  
4 A. We just played around on the stuff that was there.  
5 Q. What, their swing sets and that kind of thing?  
6 A. Yes.  
7 Q. Okay. And how many young people were there with  
8 you?  
9 A. I don't know.  
10 Q. More than five?  
11 A. I don't know.  
12 Q. Okay. Did there come a time that you left the park?  
13 A. Yes.  
14 Q. While you were at the park, did you consume any  
15 alcoholic beverages?  
16 A. No.  
17 Q. And anything else that could alter your senses?  
18 A. No.  
19 Q. Then you left the park. Where did you go after you  
20 left the park, please?  
21 A. To my grandmother's.  
22 Q. Okay. And did you go alone or with somebody?  
23 A. With somebody.  
24 Q. Okay. And who was that? With Jimmy, your brother?  
25 A. No. His name is Jerry Kingsbury.